***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

BRIEF FOR APPELLEE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17120

HANSEL BRAY, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*


DAVID C. ACHESON,
*United States Attorney.*
FRANK Q. NEBEKER,
JOSEPH A. LOWTHER,
BARRY I. FREDERICKS,
*Assistant United States Attorneys.*

## QUESTIONS PRESENTED*

In the opinion of the appellee, the following questions are presented:

1. Was the evidence sufficient to support the jury's verdict?

2. Did the trial court properly refuse to grant appellant's prayer for a "Missing Witness Instruction?"

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*Appellant is proceeding *pro se* and it has been extremely difficult to discern from his brief just what issue he seeks to raise on appeal. Therefore, appellee has, in an attempt to aid the Court, pieced together what he believes to be the relevant issues for appellant review. He has done so with reference to the various petitions and other papers filed in the instant case. No memorandum in support of the application to appeal in forma pauperis was ever filed in this case.



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## BRIEF FOR APPELLEE

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### COUNTERSTATEMENT OF THE CASE

Appellant was indicted on June 17, 1961, in a two-count indictment charging him with violations of 22 D.C. Code 2901 (robbery). On September 8, 1961, a jury found appellant guilty as charged. By Judgment and Commitment filed September 29, 1961, appellant was sentenced to serve five to fifteen years on each count of the indictment, sentences to run concurrently.

On October 4, 1961, appellant filed a motion for leave to appeal *in forma pauperis*. This motion was denied by the District Court on October 10, 1961. On October 17, 1961, appellant filed a motion pursuant to 28 U.S.C. 2255, seeking reduction of his sentence. This motion was denied by the District Court on October 25, 1961. On January 16, 1962, appellant filed a second motion pursuant to Section 2255. This motion was denied by the District Court on March 26, 1962. By order dated May 11, 1962, this Court allowed appellant to appeal *in forma pauperis* and appointed counsel to represent him. Between May 11, 1962, and January 7, 1963,

appellant was represented by seven different attorneys, each of whom was permitted by order of this Court to withdraw from the case. Appellant's last-appointed attorney, Myron G. Ehrlick filed a motion on December 19, 1962, to withdraw, citing *Ellis* v. *United States*, 356 U.S. 674 (1957). By order of this Court dated January 17, 1963, Mr. Ehrlick was allowed to withdraw. No other counsel was appointed and appellant now proceeds *pro se*.

**Perpetration of crimes charged**

On Thursday, June 22, 1961, one Luther Hamilton, his wife, Vivian Hamilton, James Tymas and a Mrs. Gross were in a High's Dairy store, located at 4601 Sheriff Road in the District of Columbia (Tr. 8). At approximately 11:00 p.m. appellant entered the store and ordered a pint of ice cream. As the attendant, Mrs. Hamilton, was getting the ice cream, appellant pulled out a gun and held it on the persons in the store. He then proceeded to empty the cash register. After taking the money from the register appellant fled the scene (Tr. 10–11).

On June 24, 1961, one Shirley T. Polland was employed as a bus driver for the District of Columbia Transit Company. At approximately 2:00 a.m., on July 24th, Mr. Polland had parked his bus at a bus stop at Chaplin and D Streets SE., in the District of Columbia. The doors of the bus were open to permit passengers to enter. Appellant entered the bus and pointed the gun at the bus driver. He told him to hand over the money which had been collected in fares (Tr. 43). Polland gave appellant ten one-dollar bills; appellant was not satisfied and told Polland, "Come on, give me all of it." When the bus driver replied that that was all he had, appellant reiterated his demand, stating, "Come on boy, get that box open. I know you have some more" (Tr. 44). Polland then gave appellant an additional $15.00. Appellant was not satisfied and demanded that the bus driver give him the "change carrier" (Tr. 44). Upon receiving this additional money appellant turned and ran down D Street (Tr. 45). The police were summoned to the scene, and appellant was subsequently arrested in the immediate area (Tr. 57–58).

### Testimony at trial

Appellant was positively identified by several Government witnesses. As his defense, appellant testified that he was with one Moses Brown on June 22nd at the time that the robbery of the High's store had taken place (Tr. 79–80); and that he was visiting with one Jacqueline Grant in the early morning hours of June 24th at the time the robbery of the D.C. Transit Bus had taken place. Brown was called as a Government witness. He stated, on cross-examination, that he had been with appellant early in the evening of June 22, 1961; but he did not corroborate appellant's testimony by stating that he was with appellant at the time that the first robbery had taken place (Tr. 38). Brown was not called as a witness for the defense. In the course of the trial, Jacqueline Grant was never called to testify.

## STATUTE INVOLVED

Title 22, District of Columbia Code, Section 22–2901 provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

## SUMMARY OF THE ARGUMENT

### I

Three eye witnesses positively identified appellant as the armed bandit who committed the robberies. Appellant was apprehended in the immediate vicinity of the second robbery and was at that time in possession of recently stolen property. Therefore, the evidence was clearly sufficient to sustain the jury's verdict of guilty.

### II

The two witnesses whom the Government failed to call were not "peculiarly available" to it, and their testimony would have

been at best cumulative in nature. Therefore, the trial properly refused to give the "missing witness instruction" which appellant had requested.

## ARGUMENT

### I. The evidence presented was sufficient to sustain the jury's verdict

At the conclusion of the Government's case, appellant made a motion for judgment of acquittal, which was denied by the District Court. After presenting the case for the defense the appellant failed to renew his motion for judgment and acquittal (Tr. 116–137). Thus, having failed the proceedings below to properly challenge the sufficiency of the evidence, appellant is estopped from asserting it as a basis for reversing his conviction. *Battle* v. *United States*, 92 App. D.C. 20, 206 F. 2d 404 (1953). *Cratty* v. *United States*, 82 U.S. App. D.C. 236, 163 F. 2d 844 (1947). Even apart from this consideration the record contains sufficient evidence to support the jury's verdict of guilty.

Two eye witnesses, Luther Hamilton and Lillian Gross, who were present in the store when appellant committed the robbery, positively identified appellant as the armed bandit (Tr. 9–10, 21–22). Moreover, Mrs. Gross identified Government's Exhibit I as the gun used by appellant. She further identified Government's Exhibit II, a shirt which appellant attempted to hide at the time of his arrest, as the shirt worn by the armed robber on June 22, 1961 (Tr. 24).

Shirley T. Polland, the complaining witness in the second robbery, also positively identified appellant as the man who held him up on June 24, 1961 (Tr. 43–47). Moreover, appellant was arrested in close proximity to the scene of the second robbery (Tr. 57) and at the time of his arrest he was attempting to dispose of his recently stolen property (Tr. 57).[1]

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[1] At the time that the arresting officer apprehended appellant he was attempting to hide the change carrier which had just been taken from bus driver Polland (Tr. 58). He had wrapped this change carrier in a shirt, which was subsequently identified as worn by the man who robbed the High Dairy store on June 22, 1961 (Tr. 24). Moreover, close to where appellant was apprehended the arresting officer discovered a 1955 green Buick Convertible, the glove compartment of which contained appellant's wallet in which the officer found appellant's draft card, social security card and other miscel-

The positive identifications by three eye witnesses and the inferences which can be drawn from appellant's unexplained possession of recently stolen property is more than ample to sustain the jury's verdict of guilty.

## II. Trial court properly denied appellant's request for a missing witness instruction

Appellant submitted ten instructions to the trial court. These instructions were in the main given to the jury as part of the court's charge. However, the court refuses to give appellant's prayer No. 5, which was a request for a "missing witness instruction."

The request for a "missing witness instruction" pertained to the Government's failure to call Mrs. Vivian Hamilton and Mr. James Tymas, two persons who were present in the High's Dairy at the time of the robbery. However, the Government did call Mr. Hamilton and Miss Gross, who were also present in the High store at the time of the robbery, and both of these witnesses gave a full account of the incidents leading up to and the perpetration of the robbery. Any testimony which Mrs. Hamilton or Mr. Tymas might have given would have been cumulative in nature. Moreover, these witnesses were not "peculiarly available" to the Government. Thus, the trial court properly denied appellant's request for a missing witness instruction. *Graves* v. *United States*, 150 U.S. 118 (1893); *Richards* v. *United States*, 107 U.S. App. D.C. 797, 275 F. 2d 655 (1960); *Billeci* v. *United States*, 87 U.S. App. D.C. 274, 184 F. 2d 394 (1950); *Milton* v. *United States*, 71 App. D.C. 394, 110 F. 2d 556 (1940).

Appellee is unable to summarize what appellant is attempting to put in issue by allegation No. 5 in his petition of November 1, 1961, in which he states:

> "The Court erred in changing juries from the first count where they used the same jury for both counts."

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laneous papers. On the floor of the car the officer recovered an amount of money (one ten- and seven one-dollar bills) similar to the amount taken from the bus driver (Tr. 61–62). The gun used in both robberies was subsequently found lying on the ground between the automobile, and the shirt and the change carrier which appellant had attempted to hide (Tr. 65).

Appellee is unable to discern any error in the trial court's charge to the jury. And it is further noted that appellant's trial counsel did not make objection to the court's charge (Tr. 167). See Rule 30 Fed. R. Crim. P. If by this allegation appellant is contending that he should have been tried separately for each of the robberies, it is noted that no motion for severance was ever made in the proceedings below.[2]

## CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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FRANK Q. NEBEKER,
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[2] Appellant, in what has been filed as his brief on appeal, appears also to complain about the fact that certain witnesses were present in the court room during trial. The transcript will show that these witnesses had already testified in the course of the Government's case in chief, and were recalled to the stand in rebuttal.

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